MOHAMAD IQBAL A RAHMAN

v.

KETUA PENGARAH IMIGRESEN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR MUSA J
[CRIMINAL APPLICATION NO: 44-69-2003]
29 SEPTEMBER 2004

PREVENTIVE DETENTION: *Detention order - Validity - Detention under Immigration Act 1959/1963 - Prohibited immigrant - Whether effective date when person was made a prohibited immigrant stated in order of removal - Whether detention unlawful*

IMMIGRATION: *Cancellation of entry permit - Prohibited immigrant - Immigration Act 1959/1963, s. 14(4) - Detention pending deportation - Whether unlawful*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Detention - Prohibited immigrant - Whether detention prior to deportation unlawful*

The applicant, a Jemaah Islamiah suspect, was detained under the Internal Security Act 1960 on 22 August 2001. A few days before the expiry of the detention period *ie*, 18 August 2001, the director general of immigration ('DG') declared him to be a prohibited immigrant under s. 14(4)(b) of the Immigration Act 1959/1963 ('the Act') as shown in 'JK1' of encl. 7. The DG then issued the necessary notice as required by s. 14(5) of the Act. On 25 August 2003, an order of removal was issued to the applicant under s. 3(3)(a) of the Act ('JK3'). Pending such 'removal', a detention order under s. 34(1) of the Act was issued by the DG until arrangements could be made for deportation. The applicant thus filed a *habeas corpus* for his immediate release and argued that the declaration by the DG was wrong in law and that his arrest, detention and deportation was illegal and a nullity.

Held (allowing the application):

[1] There must be a specific averment as to when such a person was made a prohibited person or a specific reference to the instrument that declared that person as a prohibited person. 'JK3' should have been worded in such a manner as to enable one to know when the applicant was being declared a 'prohibited immigrant' by virtue of s. 14(4) which prohibits such a person from remaining in Malaysia. In the present case, *vide* JK1, the effective date is 18 August 2003. That date must be reflected specifically

in 'JK3' to enable the affected person to lodge the necessary appeal if he chose to do so as provided by law. However, the first paragraph of 'JK3' did not state the date as to when the applicant was allegedly in contravention of s. 15(4) of the Act. Hence, the court concluded that the detention of the applicant prior to his deportation was unlawful. (p 552 d-g)

[Application allowed; no order made on writ of habeas corpus as applicant was deported on day of hearing; detention of applicant prior to his deportation was declared unlawful.]

Legislation referred to:
Immigration Act 1959/1963, ss. 3(3)(a), 8(3)(k), 14(4)(b), 15(1)(b), 33(2), 34(1), (2)

For the applicant - Edmond Bon (Amer Hamzah Arshad); M/s Chooi & Co
For the respondents - Fazillah Begum SFC (Mohd Abazafree Mohd Abbas)

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Kadir Musa J:
By originating motion as per encl. (2), the applicant, Mohamad Iqbal bin A. Rahman, represented by learned counsels Encik Amer Hamzah Arshad and Edmund Bon applied to this court for, *inter alia*;

(1) the applicant be brought before this court during the hearing of his application;

(2) a declaration that his arrest, detention and deportation was wrong, illegal and a nullity;

(3) an issuance of a writ of *habeas corpus* for his immediate release.

The respondents were represented by the learned senior federal counsel, Cik Fazillah Began.

At the hearing proper, Encik Amer informed the court that the applicant was first arrested and detained under the Internal Security Act 1960 on 22 August 2001 for two years. A few days before the expiry date of the said detention period, 22 August 2003, the Director-General of Immigration, Malaysia, on 18 August 2003, declared that the applicant was "an unlawful person" as being "a prohibited immigrant" under s. 14(4)(b) of the Immigration Act 1959/1963 ("the Act").

The said section states:

> (4) **Where a person has entered Malaysia by virtue of a permit** or certificate, **and the Director-General is satisfied**:
>
> (a) ... ; or
>
> (b) **that the person is a prohibited immigrant, the Director-General may declare at any time after the date of entry,** that **the presence** of that person in **Malaysia is unlawfully.** (emphasis added).

The presence of the words "is satisfied" read together with "may declare" gives the Director-General a wide discretionary power to administratively declare "at any time after the date of entry of any person" entering Malaysia legally by virtue of a "valid permit or certificate" as a prohibited immigrant. Upon making such declaration, procedure set out in s. 14(5) must be observed and the person affected has a right to appeal against such a declaration. Consequential to making such a declaration, the person affected shall not remain in Malaysia after the making of the said declaration by virtue of s. 15(1)(b) of the Act.

Section 15(1)(b) of the Act provides:

> (1) Without prejudice to any other provision of this Act prohibiting from remaining in Malaysia, a person shall **not** remain in Malaysia:
>
> (a) ...;
>
> (b) **after** the making of a declaration under section 14(4); (emphasis, added).

which entails "any prohibited immigrant" to be removed from Malaysia after such a declaration being made.

However, before the necessary arrangements "to remove" such a person from Malaysia can be administratively taken under s. 34(2) of the Act, he can be lawfully detained in custody in accordance with s. 34(1) of Act if there is no appeal lodged against such declaration under s. 33(2) of the Act by the said prohibited immigrant.

Section 33(2) aforesaid provides:

> (2) Any person in respect of whom an order of removal has been made under sub-section (1) (which includes section 15(1)(b) of the Act) **may** appeal **to** the Minister in such a manner and within time as may be prescribed; (emphasis added).

and s. 34(1) states:

> (1) Where any person is ordered to be removed from Malaysia under this Act, such a person **may be detained in custody for such a period as may be necessary for the purpose of making arrangements for his removal**:
>
> **Provided** that any person detained under this sub-section who appeals under section 32(2) against the order of removal **may**, in the discretion of the Director-General, **be released, pending** the determination of his appeal, **on** such conditions as to furnishing security or otherwise as the Director-General may deem fit. (emphasis added).

Interpretative analysis of all the aforesaid sections quoted above, enables me to summarise their effect to the followings:

(1) Any immigrant can enter Malaysia legally either on a relevant "valid permit or certificate";

(2) Having so entered, upon the Director General's satisfaction, a wide discretionary power is given to him to declare any such person as "a prohibited immigrant" under s. 15 of the Act;

(3) Such declaration by the Director-General can be made at any time after any original lawful entry of such immigrant;

(4) Once such a declaration is made, the affected person must be notified of the said declaration either to his known address or be published in "such a manner as the Director-General thinks fit";

(5) Such declaration must include the grounds on which it was made and the right of appeal by the affected person against the said declaration to the Minister whose decision shall be final;

(6) If conditions specified in (4)-(6) above have been complied with, and:

(a) the affected person elected not to exercise his right of appeal, he can then be detained in custody with the view of deporting him in accordance of s. 33(2), or

(b) the affected person elected to exercise his right of appeal, he can still be detained as in (a) aforesaid or be released "on such conditions as to furnishing security or otherwise as the Director-General may deem fit" under s. 34(1); and

(7) The said detention is for the purpose of making necessary arrangement(s) for the affected person's deportation from Malaysia to the country of his origin.

From the printed evidence of this application before me, it is clear that the relevant declaration made by the Director-General of Immigration in respect of the applicant's detention pending deportation pivoted on the aforesaid sections, *inter alia*, as portrayed by encl. (7) of this application.

In para. (3.2) of encl. (7), Dato' Mohd Jamal Kamdi, the Director-General, specifically stated that he declared the applicant as "seorang imigran larangan" ("a prohibited immigrant") under s. 14(4)(b) of the Act as reflected by "JK1" to encl. (7). His "satisfaction" spoken of in s. 14(4) was based on the Minister's satisfaction under s. 8(3)(k) of the Act, which states of follows:

(8) Prohibited Immigrants:

(1) ... .

(2) ... .

(3) The following persons are numbers of the prohibited classes:

...;

(k) any person who, in consequence of information received from any source deemed by the Minister to be reliable, ... through official ... channels, is deemed by the Minister to be an undesirable immigrant;

and in third paragraph of "JK1" to encl. (7), he averred as follows:

DAN BAHAWASANYA, MENTERI DALAM NEGERI MALAYSIA, telah mengistiharkan kemasukan dan permastautin MOHAMAD IQBAL BIN A.RAHMAN di Negara ini adalah tidak diingini dan oleh yang demikian, MOHAMAD IQBAL BIN A. RAHMAN adalah termasuk dalam golongan orang-orang yang tidak dingini dan dilarang masuk ke Negara ini di bawah Seksyen 8(3)(k), Akta Imigresen 1959/63.

He further stated in paragraph four of the same exhibit as follows:

DAN OLEH ITU, saya, DATO' MOHD JAMAL BIN KAMDI, Ketua Pengarah Imigresen Malaysia, setelah berpuashati yang MOHAMAD IQBAL BIN A. RAHMAN adalah Imigran larangan menurut Seksyen 14(4)(b), akta yang sama, mengistiharkan bahawa kehadiran[nya] dari tarikh pengistiharan ini adalah bertentangan dengan undang-undang. (emphasis added).

and date of the said declaration is 18 August 2003.

Based on the above, it is clear that the said Director-General was acting under s. 14(4)(b) of the Act. By virtue of that declaration, the applicant is, by operation of law, became "a prohibited immigrant" as from 18 August 2003. Consequential to that declaration he then issued the necessary notice as required by s. 14(5) of the Act as seen in "JK2a" to the said encl. (7). That notice was served by Hamzah b. Hj. Abas to and received by the applicant on the same day as shown in "JK2b" of the same encl. Thus an "Order of Removal" was later, on 25 August 2003, issued by the Kuala Lumpur Director-General of Immigration under s. 3(3)(a) of the Act as "JK3" to encl. (7). Pending such "removal", a "Detention Order" under s. 34(1) of the Act was issued by the same Director "... until arrangements can be made for (his) return to (his) place of embarkation or country of citizenship," as exhibited by "JK4". Everything seemed to be in order, unless the aforesaid "JK3" is examined in depth.

In the first paragraph of the said "JK3" it states as follows:

> WHEREAS the below mentioned person did enter Malaysia on or about – in contravention of section 15(4) Immigration Act 1959/63.
>
> MOHAMAD IQBAL BIN A.RAHMAN
>
> Indonesia (L-17/08/1957)
>
> ...

which, I must agree with the learned counsel for the applicant, has not stated any date as to when the applicant was "... in contravention of s. 15(4) of (the Act) ...". Section 15(4) by itself speaks of an offence(s) "in contravention" of s. 15(1) and (2) of the Act and the permitted sentence that can be passed to any person found guilty of any of the said prescribed contravention(s).

From the facts of the application, the applicant was not in breach of s. 15(1)(a) of 15(1)(c) or 15(2). He can neither be in contravention to s. 15(1)(b) because he is not the architect of the relevant declaration under s. 14(4) of the Act. The maker of it was the Director-General of Immigration Malaysia as demonstrated above. By making this application, it cannot be considered the applicant is "in contravention" within the context of s. 15(4) of the Act as stated in "JK3", neither can it be said that the said Director-General cannot exercise his power under s. 14(4) acting upon s. 8(3)(k) of the Act. If that is so, it is my considered conclusion that "JK3" is bad in law. Why?.

It is not disputed by the parties that the applicant was detained under the "valid order" consequential to the declaration made by the Director-General under s. 14(4) of the Act. That "valid order" can only be "valid and lawful" if it is in compliance with the "substantive requirement(s)" of the procedure of issuing such order. Failure in one will certainly affect another. The "Order of Detention" under s. 34(1) is symbiotic with "Order of Removal" under s. 33(1) of the Act.

From the facts of the application, it has also never been disputed by both parties that the applicant entered Malaysia legally otherwise he would not have been given "permanent status". As such, there is no question he contravenes any of the ss. 15(1)(a) or (c) or 15(2) of the Act. However, such legal entry of any immigrant, can, by operation of law as explained above, be deemed to be a "prohibited immigrant" under s. 14(4)(b) of the Act making the "detention in custody" of such person lawful with the view of "deporting" him to his place of "embarkation" or "country of citizenship". For that reason there must be specific averment as to when such a person was made a prohibited person or a specific reference to the instrument that declared that person as prohibited person.

"JK3" should have at least, be worded in such a manner as to enable one to know as to when the applicant is being declared as "a prohibited immigrant" by virtue of s. 14(4) that prohibits such a person to remain in Malaysia as from when the declaration is intended to take affect. In the present application, *vide* "JK1 to encl. (7), the effective date is 18 August 2003. That date must be reflected specifically in "JK3". The wisdom of doing so is, in all probability, to enable the affected person to lodge the necessary appeal if he chooses to do so provided by law to him to the Minister as discussed earlier. That was not done, which compelled me to conclude that detention pursuance to "Order of Detention" as per "JK4" to be illegal.

In passing and if I am being permitted to suggest, the relevant part of the "JK3" should at least be worded as follows:

> WHEREAS the below person **has been declared as a prohibited person by the Director-General of Immigration Malaysia on 18/8/03 under section 14(4)(b) of the Immigration Act 1959/63.**
>
> ...

In such an "order", even if it does not state when such a person "enter Malaysia" as strongly contended by his learned counsel, I would not say that the said "JK3" is defective in law.

In conclusion, and on the premises above, without going to "whether or not" the applicant was, in fact, given the opportunity to appeal to the Minister, the above discussion has given sufficient ground to allow the application. Unfortunately, at the time the matter came for hearing, I was informed that the applicant was deported to Indonesia that very morning. As such, I did not make any order as to the issuance of the writ of *habeas corpus*, but instead held that the "detention" of the applicant, prior to his "deportation" for the reasons stated above as unlawful.